

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. 20-cr-0316 WJ

TROY LIVINGSTON,

Defendant.

**UNOPPOSED MOTION TO CONTINUE SENTENCING HEARING AND
RELATED DEADLINES**

Defendant Troy Livingston, by and through his attorney, Theresa M. Duncan, respectfully moves the Court to continue the sentencing hearing scheduled for February 17, 2021, and all related deadlines, for 90 days. The United States does not oppose this request.

In support of this motion, Mr. Livingston states as follows:

1. On August 4, 2020, Mr. Livingston plead guilty to second-degree murder, in violation of 18 U.S.C. §§ 1153 and 1111. [Dkt. 50.] The plea agreement contains no agreement as to sentencing, except regarding Mr. Livingston's acceptance of responsibility. [Dkt. 49.]
2. Sentencing is currently scheduled for February 17, 2021. [Dkt. 55.] The Presentence Investigation Report was disclosed on October 13, 2020. [Dkt. 52.]

3. The defense sentencing investigation continues to be stalled by the current pandemic. Given the Court's discretion at sentencing and the wide range of potential sentences available to the Court under the relevant statutes (0 years to life imprisonment), the defense needs to collect substantial information relevant to sentencing and may call witnesses at the sentencing hearing. Mr. Livingston and his counsel simply cannot complete these tasks under the current conditions.

4. Mr. Livingston is a member of the Navajo Nation, as are the majority of the mitigation witnesses and the victim's family. The Navajo Nation has been hit particularly hard by COVID-19, and its leaders have imposed nighttime and weekend curfews to control the spread of the disease. Members of the defense team cannot travel to meet with witnesses or collect documents until after the pandemic is under control. Moreover, witnesses cannot travel to Albuquerque for meetings with members of the defense team, or even to attend the sentencing hearing, given the current risks of infection.

5. As this Court is aware, COVID vaccines are slowly being made available. On December 11, 2020, the FDA issued an emergency use authorization (EUA) to permit the use of the Pfizer COVID-19 vaccine in persons age 16 years or older. A second EUA was issued on December 18 to permit the use of the Moderna

COVID-19 vaccine in persons age 18 years and older.¹ Both vaccines require two injections, with the second following between three and four weeks after the first.

6. The interim guidance offered by the Advisory Committee on Immunization Practices (ACIP) provides that health care personnel and residents of long-term care facilities receive COVID-19 vaccines during the first phases of any vaccination program (Phase 1a).² In Phase 1b, the vaccine will be offered to persons 75 years or older and non-health care frontline essential workers, and in Phase 1c, to persons aged 65–74 years, persons aged 16–64 years with high-risk medical conditions, and essential workers not included in Phase 1b. Although prisoners in county, state, and federal facilities have infection rates significantly higher than the general population,³ it is unclear when they will be eligible to receive the vaccine. It is also unclear when members of the defense team, experts and potential witnesses will be eligible to be vaccinated.

¹ “COVID-19 Vaccine Distribution,” U.S. Department of Health and Human Services, <https://www.hhs.gov/coronavirus/covid-19-vaccines/distribution/index.html> (last visited Jan. 15, 2021).

² “The Advisory Committee on Immunization Practices’ Updated Interim Recommendation for Allocation of COVID-19 Vaccine — United States, December 2020,” Centers for Disease Control and Prevention, https://www.cdc.gov/mmwr/volumes/69/wr/mm695152e2.htm?s_cid=mm695152e2_w (last visited Jan. 15, 2021).

³ Beth Schwartzapfel, et al., “One in Five Prisoners in the U.S. Has Had COVID-19,” The Marshall Project (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-hadcovid-19>.

7. Mr. Livingston is seeking a ninety-day continuance based on current projections regarding administration of the COVID-19 vaccinations and, in conjunction with a vaccine or otherwise, projections that the risk of infection will subside in the coming months.⁴ Although Mr. Livingston is incarcerated pending sentencing, given the offense to which he pleaded guilty, he expects the Court to sentence him to a substantial term of incarceration. Thus, the requested continuance will not prejudice him.

Undersigned counsel has conferred with counsel for the United States, David Cowen, who stated he does not oppose a continuance of the sentencing hearing and related deadlines.

CONCLUSION

WHEREFORE, based upon the foregoing, Defendant Troy Livingston respectfully requests that this Court continue his sentencing hearing and all related deadlines, including those set forth in Fed. R. Crim. P. 32 and D.N.M.LR-CR 32, for ninety days.

⁴ With the rollout of the vaccine, the infection rate in New Mexico is beginning to decline. *See* New Mexico Coronavirus Map and Case Count, available at <https://www.nytimes.com/interactive/2020/us/new-mexico-coronavirus-cases.html> (last visited Jan. 15, 2021).

Respectfully submitted,

/s/ Theresa M. Duncan
Theresa M. Duncan
Duncan Earnest LLC
515 Granite NW
Albuquerque, NM 87102
505-842-5196
teri@duncanearnest.com

Attorney for Defendant Troy Livingston

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served on all parties by operation of the Court's CM/ECF electronic filing system and pursuant to the CM/ECF Administrative Procedures Manual §§1(a), 7(b)(2), on January 15, 2021.

/s/ Theresa M. Duncan
Theresa M. Duncan